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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JULIO CARLOS MARTINEZ, Defendant and Appellant.	H026988 (Santa Cruz County Super. Ct. No. F07985)

STATEMENT OF THE CASE

A jury convicted defendant Julio Carlos Martinez of selling heroin, conspiracy to sell heroin, and loitering with intent to commit a drug offense.[1] (Health & Saf. Code, §§ 11352, subd. (a), 11532, subd. (a); Pen. Code, § 182, subd. (a)(1).) The court suspended imposition of sentence, placed defendant on probation, and ordered him to serve a total of 270 days in jail for all three offenses. The court granted him 131 days of presentence custody credit. The court also ordered him to pay $1,000 to reimburse the county for the legal services rendered by appointed counsel.

On appeal from the judgment, defendant claims the trial court erred in admitting evidence of prior bad acts, failing to award the proper amount of custody credit, and

[1] Defendant was tried with co-defendant Ivan Toro Rodriguez, and the jury found him guilty of the same offenses.

ordering him to reimburse the county for legal services. He also claims that defense counsel rendered ineffective assistance in failing to object to the evidence of prior bad acts and failing to request a limiting instruction concerning the use of that evidence.

We modify the judgment to reflect the correct amount of custody credit and affirm the judgment as modified.

FACTS

Charged Offenses

At around noon on September 10, 2003, Lieutenant Terry Parker of the Santa Cruz County Sheriff's Department was in a third-floor office in the County Government Center in Santa Cruz, periodically watching the people below in the benchlands area of San Lorenzo Park, which that runs along the San Lorenzo River. Parker explained that the San Lorenzo River corridor is known for drug use and trafficking because it is easily accessible and offers numerous places for concealment. From above, Parker saw defendant and Rodriguez "hanging out," drinking beer, and throwing beer cans. At one point, they talked to a third man, whom Parker had observed making suspicious hand-to-hand exchanges. Based on his experience and observations, Parker suspected that drug trafficking was taking place.

On September 11, 2003, Parker resumed his surveillance from the office window. He again saw Rodriguez and another man sitting near the tree line. He observed defendant, who was wearing a baseball cap, approach them several times, then join them for a while, and then leave. Sometime later, Megan Barron walked up to Rodriguez and the other man. As she and Rodriguez spoke, a man approached, said something to Rodriguez, and then walked away.[2] After that, defendant came up to Rodriguez, his companion, and Barron. Defendant extended a hand in greeting to the two men, talked

[2] At this point, Parker started to record what was happening on videotape. The videotape was played for the jury.

for a second, and then walked a few feet away. Keeping his back to them, defendant looked around, then knelt down, reached into the grass, and got back up. Defendant returned to the three people, knelt down, and quickly "flick[ed] his hand with sort of a backwards wave type motion" towards Barron and Rodriguez. Although Parker suspected that defendant had retrieved some drugs and brought them to Rodriguez and Barron, he did not observe what, if anything, defendant had dropped on the ground.[3] Immediately thereafter, however, he observed some money on the ground. Rodriguez picked it up and gave it to defendant, who took it and quickly walked away. Barron then got up and left. At that point, Parker directed Deputy Sheriff Frank Gombos to intercept Barron. Parker continued to watch defendant. Defendant encountered another man, who knelt down, removed a wallet, counted out some cash, and handed it to defendant, who also counted it and then appeared to drop something on the ground, using the same backhand motion. The man immediately reached down, retrieved something, put it into his mouth, and walked away. Parker explained that it was common for drug users to store drugs in their mouths so they can swallow the evidence necessary. Defendant and Rodriguez were arrested. At the time, defendant was carrying $429 in cash, mostly small denominations, and a glass smoking pipe containing a bowl of marijuana.

Deputy Gombos testified that he approached Barron, identified himself, and asked if he could talk to her. He said he had observed what appeared to be a drug sale. She denied this, saying she had only been asking for bus money. When Gombos asked for the truth and assured her that she would not be arrested, Barron took a plastic bindle from her book. It contained .79 grams of heroin and some blades of grass. She told Deputy Gombos that she had negotiated the deal with one person and bought the bindle for $30

[3] Parker testified that drug dealers working in San Lorenzo Park usually sit close to the tree line near the river. He explained that often two people work together. One acts as a lookout for the police and directs prospective buyers to a partner, who then conducts the transaction in a concealed area.

from a Hispanic man wearing a baseball cap. She said this was the third time she had bought drugs from them.

Under a grant of immunity, Megan Barron testified that on September 11, 2003, she went to an area of the San Lorenzo Park near the courthouse and river and bought heroin from a group of people. She said she threw $30 down on the ground, one Hispanic man picked it up, and another threw a bindle on the ground. One of the men wore a baseball cap. She picked it up and left.

Prior Incident

Officer Michael Harms of the Santa Cruz Police Department testified that on March 24, 2003, he and his partner were patrolling near the San Lorenzo River levee and Josephine Street. They noticed people running across the freeway near there and also observed three men amid the trees and shrubs. Two of the men ran when they saw the officers. Officer Harms's partner found a large ball of heroin.

Officer Harms and his partner returned the next day and saw defendant and another man named Venegas on the levee walking aimlessly and constantly looking around. At one point, defendant ran down the side of the levee into the shrubs and then returned to Venegas. After a while, a third man named Gerald Blumer approached defendant and Venegas and spoke to them. Defendant continued to look over his shoulder, scanning the area. At one point, Blumer took something from his pocket and handed it to Venegas. Defendant and Venegas moved some distance away, and defendant motioned for Blumer to stay put. While defendant continued to look around, Venegas took something from his waistband. Defendant then summoned Blumer, and Venegas handed something to Blumer, who then walked away. Officer Harms's partner continued to watch Blumer, and Officer Harms went to defendant and Venegas. When backup officers arrived, Officer Harms left to find Blumer. He located Blumer in the same bushes holding a syringe just about to inject himself. When Blumer saw Officer

Harms, he squirted the contents of the syringe on the ground, saying, " 'You got me,' " and told Officer Harms he had bought heroin from Venegas.

The Defense, Rebuttal, and Surrebuttal

Defendant's brother Juan Martinez testified for the defense. He said that sometime before September 11, 2003, his employer paid defendant $500 for painting some frames. He further testified that he personally gave defendant the $500, all of it $20 bills.

In rebuttal, Deputy Sheriff Mark Yanez, who is in charge of asset forfeiture for the sheriff's department, testified that he received the money that Parker had seized from defendant. He also served defendant with several documents, including a receipt for the money taken from him; a notice of seizure, informing defendant that the county would attempt to keep the money because it related to a drug transaction; and information concerning how defendant could oppose forfeiture and obtain return of the money.

In surrebuttal, defense counsel testified that he discussed with defendant the money that had been taken from him. Although defendant was adamant about getting it back, counsel advised him not to seek its return even if the money was his.

ADMISSION OF THE PRIOR INCIDENT

Defendant contends that the court erred in admitting evidence of his arrest on March 25, 2003, to prove a common plan or scheme and intent.[4]

Under Evidence Code section 1101, subdivision (b), evidence of a defendant's unlawful or wrongful conduct on a prior occasion is admissible "when relevant to prove

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[4] The court stated, "I think that the common elements here are the fact that you have this—two persons allegedly have a two-person team involved in a sale transaction, one of whom is working as a lookout and going to get the drugs that are hidden somewhere down by the river." The court further stated, "Additionally, the issue is in the loitering charges, not knowing you're not supposed to go to certain places, it's not that you're not supposed to go to a certain place where people are engaging in drug transactions, and again sufficient similarities that may be noticed that could be inferred by the jury from the prior circumstances."

some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her dispositionj to commit such an act." (Evid. Code, § 1101, subd. (b).)

The relevance and probative value of prior criminal conduct arises, in part, from its similarity to conduct for which the defendant is currently being prosecuted. (See *People v. Thompson* (1980) 27 Cal.3d 303, 316; *People v. Harris* (1998) 60 Cal.App.4th 727, 740.) The degree of similarity necessary to admit such evidence varies, depending upon the purpose for which it is being offered. "The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.] '[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act . . . .' [Citation.] In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant ' "probably harbor[ed] the same intent in each instance." [Citations.]' [Citation.]" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.)

"A greater degree of similarity is required in order to prove the existence of a common design or plan . . . . [I]n establishing a common design or plan, evidence of uncharged misconduct must demonstrate 'not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.' [Citation.] '[T]he difference between requiring similarity, for acts negativing innocent intent, and requiring common features indicating common design, for acts showing design, is a difference of degree rather than of kind; for to be similar involves having common features, and to have common features is merely to have a high degree of similarity.' [Citations.] [¶] To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous

acts, but the plan thus revealed need not be distinctive or unusual. For example, evidence that a search of the residence of a person suspected of rape produced a written plan to invite the victim to his residence and, once alone, to force her to engage in sexual intercourse would be highly relevant even if the plan lacked originality. In the same manner, evidence that the defendant has committed uncharged criminal acts that are similar to the charged offense may be relevant if these acts demonstrate circumstantially that the defendant committed the charged offense pursuant to the same design or plan he or she used in committing the uncharged acts. Unlike evidence of uncharged acts used to prove identity, the plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense. [Citation.]" (*People v. Ewoldt, supra,* 7 Cal.4th at pp. 402-403.)

We review the trial court's ruling—not necessarily its reasoning—to admit the evidence "for an abuse of discretion, examining the evidence in the light most favorable to the court's ruling. [Citation.]" (*People v. Catlin* (2001) 26 Cal.4th 81, 120; *People v. Mason* (1991) 52 Cal.3d 909, 944.) We will find an abuse of discretion only where the trial court's decision exceeded the bounds of reason. (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1519.)

Defendant asserts that although he was arrested on March 25, 2003, his conduct was entirely innocent. He notes that he did not have drugs or money on him; he was not charged with a crime; and Blumer incriminated only Venegas. Thus, he argues that his conduct on March was not material to prove any element of the charged offenses. Defendant further argues that his conduct on March 25, 2003, was so dissimilar to his conduct on September 11, 2003, that a jury could not reasonably infer that a common plan guided him in both instances. In this regard, he notes that the March 25 and September 11, 2003 incidents took place at entirely different places; he was seen with Venegas for far less time than he was seen with Rodriguez; and he did not speak to or exchange anything with Blumer. Last, defendant asserts that the prior arrest evidence

was far more prejudicial than probative because it "directed the jury's attention to the presence of drugs, specifically, heroin," rather than his lack of involvement in the transaction between Venegas and Blumer.

Contrary to defendant's suggestion, the evidence does not simply show that he was out for an innocent stroll on the levee with Venegas, oblivious to what Venegas was doing. Defendant ignores evidence showing that he actively participated in the sale of drugs to Blumer. In particular, he and Venegas were walking together without apparent purpose and constantly checking the area around them. Then a third person approached and spoke to them. While defendant continued to scan the area, Blumer handed something to Venegas. Venegas and defendant then walked some distance away. Defendant motioned to Blumer to stay where he was. After a moment, Venegas retrieved something from his waistband. Defendant then summoned Blumer, who approached them. At that point, a second hand exchange took place. A short time later, Officer Harms found Blumer about to inject heroin, and Blumer incriminated Venegas in the sale.

The prosecution was not required to prove beyond a reasonable doubt that defendant aided and abetted a sale of heroin to Blumer. Rather, the prosecution need only prove prior misconduct by a preponderance of the evidence. (CALJIC No. 2.50.1; *People v. Carpenter* (1997) 15 Cal.4th 312, 381-382.) When viewed in the light most favorable to the court's ruling, the evidence satisfied this burden and was sufficient to show that defendant and Venegas were working together along the river levee selling heroin. Moreover, differences in the details of the March 25 and September 11, 2003 incidents do not hide the fundamental similarity of the incidents: the seemingly casual association of two men in a public location along the river, where there are ample places for concealment; the vigilance they exhibited concerning who was there and might be watching; their orchestrated and complementary acts during the course of the transactions; the surreptitious hand exchanges; and the type of drug being sold. Consequently, we agree with the trial court that there was sufficient similarity to support an inference that in

each instance, defendant was not simply in the wrong place at the wrong time with the wrong people but was instead acting with the same purpose and intent to sell heroin.

Defendant also fails to demonstrate that the evidence was more prejudicial than probative. (See Evid. Code, § 352.) Evidence of the March 25, 2003 incident was not remote or confusing. It was not stronger or more inflammatory than the evidence of his current offenses. And, its presentation did not unduly prolong the trial. Moreover, any potential prejudice was ameliorated by the court's instruction that jurors could not consider the evidence to prove that defendant is a person of bad character or that he has a disposition to commit crimes. Under the circumstances, the trial court could reasonably find the evidence to be more probative than prejudicial: Although its probative weight was damaging to the defense, it did not uniquely and unfairly tend to evoke an emotional bias against defendant. (See *People v. Kipp* (2001) 26 Cal.4th 1100, 1121.)

In sum, we conclude that the court did not abuse its discretion in admitting evidence of the March 25, 2003 incident. (Cf. *People v. Lewis* (2001) 25 Cal.4th 610, 637.)

Moreover, even assuming error, we would not find prejudicial error. There was overwhelming evidence—especially the videotape and the testimony of Deputy Gombos and Barron—that defendant was "hanging out" near the river with Rodriguez to sell heroin and actively participated with Rodriguez in the sale to Barron. Under the circumstances, it is not reasonably probable that the jury would have reached a more favorable verdict on any of the charges had the evidence of the March 25, 2003 incident been excluded. (See *People v. Cole* (2004) 33 Cal.4th 1158, 1195; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant contends that defense counsel rendered ineffective assistance in (1) failing to request an appropriate limiting instruction concerning the March 25, 2003

incident and (2) failing to object to evidence that he did not seek the return of the money he possessed when arrested.

"To prevail on a claim of ineffective assistance of counsel, the defendant must show counsel's performance fell below a standard of reasonable competence, and that prejudice resulted. [Citations.] When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation. [Citation.] Even where deficient performance appears, the conviction must be upheld unless the defendant demonstrates prejudice, i.e., that, ' " 'but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " ' [Citations.]" (*People v. Anderson* (2001) 25 Cal.4th 543, 569; see *Strickland v. Washington* (1984) 466 U.S. 668, 687-688; *People v. Pope* (1979) 23 Cal.3d 412, 426.)

Limiting Instruction

The court instructed the jury that the evidence of the March 15, 2003 incident was admitted for a limited purpose and cautioned the jury that it was not to consider the evidence for any other purpose. According to defendant, the court never specified what that purpose was. Thus, he claims that counsel was incompetent in failing to request a limiting instruction identifying that purpose. In particular, he argues that counsel should have requested an instruction limiting consideration of the evidence to the charge of loitering and thereby preventing the jury from considering it in connection with the two other charges.

The record does not reflect counsel's reasons for failing to request such a limiting instruction, and we do not find that the omission was unreasonable as a matter of law.

Contrary to defendant's claim, the court gave a correct and appropriate limiting instruction. Initially, the court told the jury that the evidence concerning the

March 25 incident had been admitted against only defendant and was not to be considered against Rodriguez. The court further instructed that the evidence was admitted against defendant for only a limited purpose and could not be considered for any other purpose. Thereafter the court explained that the evidence showing that defendant committed an uncharged crime may not be considered evidence of a bad character or a propensity to commit crimes but "only for the limited purpose of determining if it tends to show the characteristic method, plan or scheme in the commission of the criminal acts similar to the method, plan or scheme used in the commission of the offense in this case which would further tend to show the existence of the intent which is a necessary element of the crime charged."

Thus, the court expressly and properly limited the jury's consideration of the evidence to the charges against only defendant and to the issues of common plan and intent. Concerning counsel's failure to request an instruction limiting the evidence to the loitering charge, we find neither ineffective assistance nor prejudice.

In seeking admission of the evidence, the prosecutor argued that it was relevant to show motive, intent, lack of mistake, and knowledge and would also "help the jury to show that he was loitering." Defense counsel argued that the prior incident was not sufficiently similar to be relevant and admissible. Counsel focused on the loitering charge and asserted that it should be the "controlling charge" in determining admissibility. The court ruled that the evidence was sufficiently similar to show a common plan or scheme and intent. The court never stated or suggested that it was admitting the evidence only to prove the loitering charge. Nor does defendant now explain why the evidence was not admissible concerning the other charges. In our view, defendant's conduct on March 25, 2003, was relevant to prove the requisite knowledge and intent for all three of the charged offenses. Accordingly, defense counsel reasonably could have concluded that a request to limit the use of the evidence to the loitering charge would have been denied. "It is well settled that counsel is not ineffective in failing to make an objection

when the objection would have likely been overruled by the trial court. [Citations.]" (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 924.)

Even if such a limiting instruction were warranted and the court would have given it, we would not find counsel's omission to be prejudicial. As noted, the evidence that defendant conspired to sell heroin, loitered with intent to sell, and knowingly and actively participated in the sale to Barron was overwhelming and far more probative than the evidence of defendant's conduct on March 25, 2003. Moreover, the court expressly limited the jury's consideration of the evidence to issues of common plan and intent and admonished them against improper uses. We find it inconceivable that the jury, having found defendant guilty of loitering, would have acquitted him of selling and conspiracy to sell had defendant's proposed limiting instruction been given. Under the circumstances, therefore, defendant cannot show that there is a reasonable probability the verdict would have been more favorable had counsel made the instructional request.

Evidentiary Objection

Defendant contends that Deputy Yanez's rebuttal testimony to the effect that defendant did not seek to reclaim the $429 seized from him was irrelevant and inadmissible. Thus, he claims that counsel was incompetent in failing to object to its admission.

Again, the record does not reveal counsel's reasons for not objecting to Yanez's testimony, and we do not find the omission to be unreasonable as a matter of law.

First, we reject the premise of defendant's argument. Defendant's brother testified that defendant had recently been paid $500 in cash for work he had done. The evidence was designed to show that the money defendant had on him when arrested was not related to drug activity and therefore that he was not engaged in selling drugs on September 11, 2003. Evidence that defendant did not attempt to get back his hard-earned money implies that he is disclaiming rightful ownership and supports an inference that it represented ill-gotten gains. Under the circumstances, defense counsel could have

forgone an objection because there were no grounds for one and it would have been overruled.

Second, counsel could have declined to object because he knew the reason that defendant did not seek return of the money and planned to reveal it and then argue that the case against defendant was weak and the prosecution was desperate. Indeed, during closing argument, defense counsel stated that the prosecution was "grasping at straws" in presenting Deputy Yanez.

Last, defendant cannot establish that counsel's failure to object was prejudicial. The prosecution did not mention the evidence during his closing argument. Rather defense counsel brought it up, reiterated why defendant had not sought return of the money, and then ridiculed the prosecution for presenting Deputy Yanez as a witness. In short, the admission of Deputy Yanez's testimony does not undermine our confidence in the validity and reliability of the jury's verdict. Consequently, we find no reasonable probability the jury would have returned a more favorable verdict had counsel objected to the rebuttal testimony.

Defendant's reliance on *People v. Fondron* (1984) 157 Cal.App.3d 390 is misplaced. There, the prosecutor cross-examined the defendant concerning his post-arrest silence; and later, during closing argument, he commented that the defendant's failure to tell the arresting officer the same story he had just told the jury indicated that his testimony was false. (*Id*. at pp. 394-395.) The admission of Deputy Yanez's rebuttal testimony is materially distinguishable from the testimony in *Fondron*.

REIMBURSEMENT FOR LEGAL SERVICES

Defendant contends that he "was denied due process when he was denied an opportunity to be heard in connection with issues relating to any obligation he may have had to make reimbursement for legal services he received."

The record reflects that at defendant's arraignment, the court asked him if he worked. The court asked how he supported himself. Defendant said he worked in San

Lorenzo. The court asked how much he made when he worked. Defendant said it depended: "[W]hen it's legal two hours, three hours, that's like 15 bucks." Under the circumstances, the court appointed the public defender, finding that defendant could afford only the $25 application fee for services. As noted, the court later tentatively ordered defendant to reimburse the county $1000 for legal services. After hearing argument, the court let its tentative ruling stand.

Defendant argues that at his arraignment, the court failed to advise him that he could be required to reimburse the county; and at sentencing, the court failed to give him a chance to be heard concerning his ability to pay.

Defendant concedes that his failure to assert these claims below waived them on appeal. (*People v. Whisenand* (1995) 37 Cal.App.4th 1383, 1395-1396.) If he had raised them at sentencing, then the issue of reimbursement and any objections he had could and would have been heard and resolved, and there would be an appropriate record for appellate review.

Defendant does not seek to avoid waiver by claiming that he was not given an adequate opportunity *to object.* He simply notes the irony in the fact that he is now unable to challenge an order to pay for the public defender's services because his public defender failed to object at sentencing. Defendant does not, however, suggest that counsel rendered ineffective assistance in failing to object.

PRESENTENCE CUSTODY CREDIT

Defendant contends that the court failed to award him the correct amount of presentence custody credit.

Penal Code section 4019 governs the calculation of presentence custody credit to which a defendant is entitled. In addition to credit for each day spent in custody, a defendant is entitled to one day for every six-day period unless the defendant refused to satisfactorily perform assigned work and another day for every six-day period unless the defendant failed to satisfactorily comply with reasonable rules and regulations at the

place of incarceration. (*People v. Fry* (1993) 19 Cal.App.4th 1334, 1340-1341.) To calculate the additional work time/good time credits, the court divides the number of actual days by four, rounds down to the nearest whole number, and then multiplies by two. (*Ibid.*; *People v. Williams* (2000) 79 Cal.App.4th 1157, 1176, fn. 14.)

The record reveals, and the parties agree, that defendant spent 131 days in custody prior to sentencing for which he was entitled to credit. Indeed, the court granted 131 days of credit. Although the court, using the formula set forth above, appears to have determined the amount of additional credit,[5] defense counsel asked the court to award only time for actual custody and allow the sheriff's staff at the county jail to determine the additional credit.

Defendant now argues that the court has an obligation to determine the total amount of credit and now requests that the judgment be modified to reflect the correct amount. However, the People argue, in essence, that defendant forfeited additional credit because defense counsel invited the error. The People further argue that defendant is not entitled to relief on appeal because he has not shown that the sheriff's staff denied him additional credit.

Although defense counsel may have thought his proposed procedure would benefit defendant, it did not insofar as the judgment is concerned, for that judgment reflects credit for only 131 days. Moreover, the People do not suggest that defendant is *not* entitled to any additional credit. It is a simple matter to calculate credit. Accordingly, we decline to apply the invited error doctrine and shall instead modify the judgment to include a correct total amount of credit.

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[5] The court based its calculation on 132 days. It divided that number by four and then multiplied by two, arriving at a total of 66 days.

Based on 131 days of actual custody, defendant is entitled to an additional 64 days of credit.[6] Thus, the total amount of credit the judgment should reflect is 195 days.

DISPOSITION

The judgment is modified to reflect a total of 195 days of credit. The clerk of the superior court is directed to prepare an amended abstract of judgment. As modified, the judgment is affirmed.

_____
RUSHING, P.J.

WE CONCUR:

_____
PREMO, J.

_____
ELIA, J.

[6] 131 divided by four (32.75), rounded down to the nearest whole number (32), and then multiplied by two equals 64.